

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SUZANNE M. BAILEY, Personal Representative  
of the Estate of CLYDE RICHARD BAILEY,  
Deceased,

Plaintiff-Appellant,

v

MAHMOOD A. KHALID, M.D. and KHALID &  
ASSOCIATES M.D.'S, P.C.,

Defendants-Appellees,

and

NORTH OAKLAND MEDICAL CENTERS, a/k/a  
PONTIAC GENERAL HOSPITAL & MEDICAL  
CENTER, ABDUL HASAN, M.D.,  
CARDIOLOGY & VASCULAR ASSOCIATES,  
P.C., HARVEY WILNER, M.D., and MICHIGAN  
NEUROSURGICAL SPECIALISTS, P.C., d/b/a  
CT SCANNING CENTER,

Defendants.

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Before: Davis, P.J., and Cooper and Borrello, JJ.

PER CURIAM.

In this medical malpractice wrongful death case, plaintiff, the personal representative of the estate of her deceased husband, appeals as of right the trial court's order granting summary disposition in favor of defendants Mahmood Khalid, M.D. (Dr. Khalid) and Khalid & Associates M.D., P.C. (Khalid P.C.), pursuant to MCR 2.116(C)(10). We reverse.

In December 1997, the decedent, who had a history of smoking and chewing tobacco, was admitted to the hospital. He was suffering from a gallbladder attack as well as other medical problems. On December 6, 1997, the decedent had a chest x-ray. The radiologist who reviewed the x-ray asserted that the x-ray suggested "A LEFT APICAL PULMONARY NODULE" and recommended "REPEAT PA AND LATERAL FILMS . . . WHEN THE PATIENT'S CLINICAL CONDITION PERMITS." On December 8, 1997, the decedent had a second chest

x-ray. According to the radiologist who reviewed it, the second chest x-ray showed that “[t]he previously reported pulmonary nodule in the left apex is suspected to be present. When the patient is clinically able, CT scanning is suggested for further evaluation.” On December 9, 1997, the decedent had a CT scan of his chest. Defendant Dr. Khalid was the radiologist who reviewed the results of the CT scan. He noted the following impressions of the CT scan:

1. EXTENSIVE SCARRING LEFT UPPER LUNG. THIS PRODUCES A PSEUDOCAVITATION APPEARANCE.
2. SMALL BILATERAL PLEURAL EFFUSIONS WITH THICKENED PLEURA RIGHT LUNG BASE POSTERIORLY.

Dr. Khalid did not order any follow-up testing in response to the results of the December 9, 1997, CT scan of the decedent’s chest.

In October 1998, the decedent, who was suffering from a fever, chest congestion, and occasional shortness of breath, attended a medical appointment with his cardiologist, Dr. Abdul Hasan. Dr. Hasan diagnosed the decedent as suffering from acute bronchitis, but ordered a cardiac chest x-ray to confirm his diagnosis and ensure that the decedent was not suffering from heart failure. Dr. Harvey Wilner, a radiologist, interpreted the decedent’s x-ray. In his findings regarding the x-ray, Dr. Wilner found that “[t]here is an extensive infiltrate in the left upper lung field. There may be some fibrocalcific change in this infiltrate. Whether this infiltrate is acute or chronic or acute infiltrate superimposed upon some chronic fibrosis cannot be ascertained from a single study.” Dr. Wilner also stated in his report that “[o]btaining previous studies or a follow up study would be most helpful in evaluating this left upper lung field.” Dr. Hasan asserted that he did not believe his office received Dr. Wilner’s written report regarding the decedent’s October 1998 chest x-ray at the time he was treating the decedent, but that he did receive a verbal report that the x-ray was “okay.” Dr. Hasan did not order any follow-up as recommended in Dr. Wilner’s written report because when he next saw the decedent in December 1998, the decedent’s symptoms had resolved.

In November 2000, the decedent began to suffer significant back pain that radiated to his left hip. He was admitted to the hospital, where a CT scan of his chest and other testing revealed a suspicious pulmonary nodule in the left upper lobe and metastatic changes in his right femur and upper arm. A needle core biopsy of his spinal fluid indicated a “[p]oorly differentiated metastatic carcinoma compatible with a lung primary (non small-cell type, adenocarcinoma).” The decedent died of metastatic lung cancer on December 25, 2000.

Plaintiff filed a medical malpractice action against defendants.<sup>1</sup> Plaintiff’s complaint alleged that Dr. Khalid presented himself to the “public . . . as being a doctor of medicine who was capable of diagnosing and/or treating the physical condition as exhibited by the Plaintiff’s

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<sup>1</sup> In addition to defendants Dr. Khalid and Khalid P.C., plaintiff’s complaint named numerous other defendants. However, the other defendants have all been dismissed from the lawsuit, and Dr. Khalid and Khalid P.C. are the only remaining defendants.

decedent[.]” Plaintiff’s complaint specifically alleged, among other allegations, that Dr. Khalid was negligent in reading, interpreting, and reporting the December 9, 1997, CT scan of the decedent’s chest, which revealed a suspicious area in the decedent’s lung, in failing to consider lung cancer as a possible cause of the suspicious area in the lung, and in failing to recommend further evaluation, additional testing, a follow-up CT scan, or a lung biopsy of the decedent’s lungs.

Defendants Dr. Khalid and Khalid P.C. moved for summary disposition under MCR 2.116(C)(10) based on plaintiff’s inability to establish a greater than 50 percent loss of opportunity to survive as required by MCL 600.2912a(2). Defendants contended that the proper time frames to consider when determining the decedent’s lost opportunity to survive was December 1997, the time of the alleged malpractice of Dr. Khalid and October 1998, when the decedent had a second chest x-ray at Dr. Hasan’s initiation, which was performed and interpreted by Dr. Harvey Wilner. Defendants asserted that Dr. Khalid’s failure to recommend a follow-up study was “rectified” after the second chest x-ray was performed in October 1998 and Dr. Wilner recommended additional follow-up. According to defendants, plaintiff could only establish that the decedent had lost a zero to 25 percent opportunity to survive between December 1997 and October 1998 and therefore could not satisfy MCL 600.2912a(2). Plaintiff argued that summary disposition in defendants’ favor was improper because she established that the decedent lost greater than a 50 percent opportunity to survive as required by MCL 600.2912a(2). According to plaintiff, an individual’s lost opportunity to survive under MCL 600.2912a(2) is measured from the date of the alleged misdiagnosis to the date of the proper diagnosis. When Dr. Khalid failed to properly interpret the CT scan in December 1997, the decedent’s chances of survival were 60 to 70 percent, and when his cancer was diagnosed in November 2000, the decedent’s chance of survival was zero percent. Therefore, plaintiff contended, she satisfied MCL 600.2912a(2) because the decedent lost a 60 to 70 percent opportunity to survive between the time of Dr. Khalid’s misdiagnosis in December 1997 and the time of the decedent’s cancer diagnosis in November 2000.

The trial court granted defendant’s motion for summary disposition, stating:

Plaintiff’s expert witness, Dr. Jeffrey Weber, has testified Plaintiff’s survival rate was decreased from 60%-70% before the alleged malpractice to 40%-70% after the alleged malpractice. Thus, Plaintiff suffered anywhere from a 0%-30% loss of opportunity to [sic] for a better result. Plaintiff asserts the Court should look to the time that the correct diagnosis was made, and not only the time period within which the follow-up study should have been performed. However, the claim against Dr. Khalid is an allegation he failed to recommend a follow-up study, not that he failed to properly diagnose the cancer. As Plaintiff’s expert has testified it is impossible to know what the follow-up study would have shown, Defendants’ assertion is correct and summary disposition is hereby granted pursuant to MCR 2.116(C)(10).

Plaintiff moved for reconsideration, and the trial court denied the motion.

Our review of a trial court’s grant of summary disposition pursuant to MCR 2.116(C)(10) is as follows:

This Court reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). *Downey, supra* at 626; MCR 2.116(G)(5). When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). [*Clerc v Chippewa Co War Memorial Hosp*, 267 Mich App 597, 601; 705 NW2d 703 (2005).]

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition based on plaintiff's failure to establish a genuine issue of material fact regarding whether plaintiff's decedent suffered a greater than 50 percent lost opportunity to survive because of defendants' negligence. To establish a claim for medical malpractice, one of the elements that a plaintiff must prove is that the defendant's negligence proximately caused the plaintiff's injuries. *Weymers v Khera*, 454 Mich 639, 647; 563 NW2d 647 (1997). The legislature has codified this element in MCL 600.2912a(2), which provides:

In an action alleging medical malpractice, the plaintiff has the burden of proving that he or she suffered an injury that more probably than not was proximately caused by the negligence of the defendant or defendants. In an action alleging medical malpractice, the plaintiff cannot recover for loss of an opportunity to survive or an opportunity to achieve a better result unless the opportunity was greater than 50%.

According to plaintiff, the trial court erred in measuring the decedent's lost opportunity to survive from the date of Dr. Khalid's (alleged) malpractice in December 1997 to the date of Dr. Hasan's (alleged) malpractice in October 1998 rather than from the date of Dr. Khalid's (alleged) malpractice to the time the decedent was diagnosed with incurable cancer in November 2000. The relevant time periods in determining the reduction of the decedent's opportunity to survive are critical to plaintiff's survival of defendants' motion for summary disposition because if the lost opportunity to survive is measured from December 1997 to October 1998, plaintiff cannot establish that the decedent suffered a greater than 50 percent lost opportunity to survive, but if the lost opportunity to survive is measured from December 1997 to November 2000, plaintiff can establish that the decedent suffered a greater than 50 percent lost opportunity to survive under MCL 600.2912a(2). Plaintiff's oncology expert, Dr. Jeffrey Weber, testified that if the decedent's cancer had been diagnosed in December 1997, the decedent would have had a 60 to

70 percent chance of five-year survival. Dr. Weber also asserted that the decedent would have had a survival rate of 40 to 60 or 70 percent in October 1998. Therefore, the decedent lost between a zero and 30 percent opportunity to survive from December 1997 to October 1998. Dr. Weber asserted that in November 2000, when the decedent's cancer was diagnosed, it was Stage 4 and was "incurable," meaning that the decedent had a zero percent chance of survival. Therefore, the decedent lost a 60 to 70 percent opportunity to survive from December 1997 to November 2000.

In *Fulton v William Beaumont Hosp*, 253 Mich App 70, 82-83; 655 NW2d 569 (2002), a panel of this Court opined that the second sentence of MCL 600.2912a(2) requires a plaintiff to show that the opportunity to survive was reduced by greater than fifty percent because of the alleged malpractice and not merely that the initial opportunity to survive before the alleged malpractice was greater than fifty percent.<sup>2</sup> Although *Fulton* did not explicitly address the relevant time periods in determining the reduction in the lost opportunity to survive, it used the date of the initial malpractice and, because the case involved a patient who died as a result of a delayed cancer diagnosis, the date of the decedent's cancer diagnosis. *Id.* at 73-74, 84. In *Klein v Kik*, 264 Mich App 682, 686; 692 NW2d 854 (2005), this Court specifically addressed the relevant time frames for determining a plaintiff's reduction of the opportunity to survive under MCL 600.2912a(2). According to *Klein*, in a wrongful death case resulting from the decedent's death from cancer, the appropriate time frame to measure the decedent's lost opportunity to survive was the reduction of the decedent's chances of survival between the time of the alleged malpractice and the discovery of the decedent's cancer: "MCL 600.2912a(2) requires plaintiff to show that the decedent's chances of survival fell more than fifty percent between the time of defendant's alleged malpractice on or around March 30, 1998, and the initial discovery of the decedent's lung cancer on July 14, 1998." *Klein, supra* at 686. "The critical points in time are the alleged misdiagnosis . . . and the beginning of the proper diagnosis . . ." *Id.* at 688-689.

Considering the relevant time periods to use in calculating the decedent's lost opportunity to survive as stated in *Fulton* and articulated more specifically in *Klein*, we must calculate plaintiff's lost opportunity to survive by determining the reduction in the decedent's opportunity

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<sup>2</sup> Plaintiff urges this Court to declare a conflict under MCR 7.215(J)(2) and convene a special panel to consider the ruling in *Fulton*. Although we note our agreement with Judge Smolenski's dissenting opinion in *Fulton* and our disagreement with the majority opinion in *Fulton*, we decline to declare a conflict in this case. Under MCR 7.215(J)(3)(a), a "[s]pecial panel may be convened to consider outcome-determinative questions only." The holding in *Fulton* is not outcome determinative in this case because the decedent's lost opportunity to survive was identical (and greater than 50 percent) whether the decedent's lost opportunity to survive is measured at the initial opportunity to survive before the alleged malpractice or whether it is measured by the reduction in the decedent's opportunity to survive from the date of the alleged malpractice to the date of the decedent's cancer diagnosis. The decedent's initial opportunity to survive in December 1997 was 60 to 70 percent and, because the result of defendant Dr. Khalid's alleged negligence was certain death, the reduction in the decedent's opportunity to survive was also 60 to 70 percent. See *Fulton, supra* at 82. Therefore, whether *Fulton* was incorrectly decided is not outcome-determinative under the facts of this case.

to survive between defendant Dr. Khalid's alleged missed diagnosis in December 1997 and when the decedent was diagnosed with cancer in November 2000. Plaintiff's oncology expert, Dr. Weber, testified that if plaintiff had been diagnosed in December 1997, he had a 60 to 70 percent chance of five-year survival. According to Dr. Weber, when the decedent was ultimately diagnosed with cancer in November 2000, his cancer was at Stage 4 and was incurable, meaning that he had a zero percent chance of survival. Therefore, the decedent's reduction in his opportunity to survive between the time of Dr. Khalid's alleged malpractice and the decedent's cancer diagnosis was between 60 and 70 percent, which satisfies plaintiff's burden under MCL 600.2912a(2).

Based on our holding in *Klein*, we agree with plaintiff's contention that the trial court erred in measuring the decedent's lost opportunity to survive from the date of defendant Dr. Khalid's alleged malpractice in December 1997 to the date of Dr. Hasan's alleged malpractice in October 1998. Under *Klein*, which, like the instant case, involved a delayed cancer diagnosis that resulted in the death of the patient, the proper dates to consider in measuring the decedent's lost opportunity to survive were the date of the initial malpractice and the date of the decedent's cancer diagnosis. *Klein, supra* at 686, 688-689. Defendants claim in this case that another doctor's superseding intervening negligence absolved them of liability, and *Klein* did not involve allegations of superseding intervening negligence on the part of another medical doctor. However, this factual distinction between the cases does not alter our reliance on *Klein* in determining the relevant time periods to consider in calculating a decedent's lost opportunity to survive because the issue of superseding negligence is generally one for the jury, *Taylor v Wyeth Laboratories, Inc.*, 139 Mich App 389, 401-402; 362 NW2d 293 (1984), and the jury has not yet made a determination regarding whether the conduct of Dr. Hasan constitutes a superseding cause.<sup>3</sup> Therefore, the allegation of superseding intervening negligence on the part of another doctor does not alter our reliance on *Klein*.

Furthermore, we reject plaintiff's contention that the trial court concluded that the conduct of Dr. Hasan constituted an intervening, superseding cause of the decedent's death which absolved defendant Dr. Khalid from liability. Although defendants raised the argument regarding Dr. Hasan's allegedly negligent conduct constituting a superseding intervening cause, our review of the trial court's ruling reveals that, contrary to plaintiff's assertion, the trial court did not explicitly rule that the conduct of Dr. Hasan constituted an intervening, superseding cause of the decedent's death.<sup>4</sup> While the trial court did not explicitly rely on the date of Dr. Hasan's alleged negligence in calculating the decedent's lost opportunity to survive, it appears that it implicitly relied on that date in concluding that the decedent lost between a zero and 30

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<sup>3</sup> Frankly, we believe it is unlikely under the facts of this case that the jury would conclude that Dr. Hasan's conduct constituted a superseding intervening cause of the decedent's death given the fact that Dr. Hasan has been dismissed from plaintiff's lawsuit and given the law of superseding intervening negligence as applied to cases involving negligent medical care.

<sup>4</sup> An issue that has not been decided by the trial court is not preserved for appellate review. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999).

percent opportunity to survive.<sup>5</sup> To the extent that the trial court may have implicitly considered or relied upon any alleged superseding negligence on the part of Dr. Hasan in concluding that one of the critical times in establishing the decedent's lost opportunity to survive was the time of Dr. Hasan's alleged malpractice, any such reliance was improper because it would have been improper for the trial court to conclude as a matter of law that Dr. Hasan's alleged negligence constituted a superseding proximate cause for several reasons. First, as we have previously stated, whether an intervening act of negligence is a superseding proximate cause is generally a question for the jury. *Taylor, supra* at 402. Second, to be a superseding cause, thereby relieving a negligent defendant from liability, an intervening force must not have been reasonably foreseeable. *Ridley v Detroit*, 231 Mich App 381, 389; 590 NW2d 69 (1998), remanded on other grounds sub nom *Ridley v Collins*, 463 Mich 932 (2000). It is reasonably foreseeable that negligent medical care might be provided. *People v Schaefer*, 473 Mich 418, 437; 703 NW2d 774 (2005), mod and clarified sub nom *People v Derror*, 475 Mich 316 (2006). Therefore, any allegedly negligent medical care on the part of Dr. Hasan would not necessarily absolve Dr. Khalid of liability. *Taylor, supra* at 402 ("An intervening cause is not an absolute bar to liability if the intervening event is foreseeable, though negligent or even criminal."). Third, "[a]n act of negligence does not cease to be a proximate cause of the injury because of an intervening act of negligence, if the prior negligence is still operating and the injury is not different in kind from that which would have resulted from the prior act." *Id.* at 401-402. Any alleged negligence of the part of Dr. Khalid was still operating at the time Dr. Hasan treated the decedent. Furthermore, the injury, further reduction in the decedent's opportunity to survive and, ultimately, early death, was identical for both doctors' alleged negligence. For these reasons, to the extent that the trial court may have relied on the date of Dr. Hasan's alleged negligence in measuring the decedent's lost opportunity to survive, any such reliance was improper. Under *Klein*, the proper time frames to consider in calculating the lost opportunity to survive under MCL 600.2912a(2) in a case involving a delayed cancer diagnosis are the date of the initial malpractice and the date of the decedent's cancer diagnosis. *Klein, supra* at 686, 688-689.

In granting summary disposition in favor of defendants, the trial court noted that plaintiff's expert was unable to say with certainty what the follow-up studies would have revealed if Dr. Khalid had ordered follow-up studies in December 1997. However, defendants moved for summary disposition based on plaintiff's inability to satisfy MCL 600.2912a(2). Based on Dr. Weber's testimony, plaintiff was able to establish a greater than 50 percent lost opportunity to survive for the decedent under MCL 600.2912a(2). The knowledge of what any follow-up studies would have revealed in December 1997 is not necessary to a determination whether plaintiff satisfied MCL 600.2912a(2) given Dr. Weber's testimony that the decedent suffered a 60 to 70 percent lost opportunity to survive from the time of Dr. Khalid's alleged malpractice to the time of the decedent's cancer diagnosis in November 2000. Absent specific

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<sup>5</sup> Although the trial court did not explicitly rely on the date of Dr. Hasan's alleged negligence in calculating the decedent's lost opportunity to survive, it did, at the very least, implicitly rely on that date in concluding that the decedent lost a zero to 30 percent lost opportunity to survive. Based on the testimony of plaintiff's oncology expert, Dr. Jeffrey Weber, the decedent lost a zero to 30 percent opportunity to survive from December 1997 to October 1998.

expert testimony establishing a greater than 50 percent lost opportunity to survive, uncertainty in a medical malpractice case regarding what further follow-up testing would have revealed might be fatal to a medical malpractice plaintiff's case at the summary disposition phase. However, viewing Dr. Weber's testimony regarding the decedent's percentages of survival in December 1997 and November 2000 in a light most favorable to plaintiff, as the nonmoving party, plaintiff was able to satisfy MCL 600.2912a(2) even though plaintiff's expert conceded that he was uncertain what follow-up testing to the decedent would have revealed in December 1997.

In deciding that the proper time frame to measure the decedent's lost opportunity to survive was the reduction in lost opportunity between December 1997 (the time of Dr. Khalid's alleged negligence) and October 1998 (the time of Dr. Hasan's alleged negligence), the trial court relied on the fact that plaintiff's claim against Dr. Khalid was "an allegation he failed to recommend a follow-up study, not that he failed to properly diagnose the cancer." We reject the trial court's rationale for its conclusion in this regard, and we observe that the trial court's characterization of plaintiff's claims against defendants is much too narrow. The allegations in plaintiff's complaint against defendants encompassed more than a mere allegation that defendant Dr. Khalid was negligent in failing to recommend a follow-up study after the decedent's December 1997 CT scan. In her complaint, plaintiff alleged that "MAHMOOD A. KHALID, M.D. . . . was a doctor of medicine . . . [who] was holding himself out to the general public, including the Plaintiff's decedent, as being a doctor of medicine who was capable of diagnosing and/or treating the physical condition as exhibited by the Plaintiff's decedent . . . ." The complaint also alleged "[t]hat as a result of Defendant KHALID, M.D.'s failure to properly read the December 9, 1997 chest CT scan . . . Plaintiff's decedent's lung nodule went undiagnosed and untreated until November of 2000 . . . ." Furthermore, the complaint alleged, among other specific allegations of negligence against defendant Dr. Khalid, that Dr. Khalid "failed to properly read, interpret, and report the December 9, 1997 CT scan" and "failed to consider lung cancer as a possible cause for the condition found on the December 9, 1997 CT scan[.]" Our review of the complaint does not support the trial court's conclusion that plaintiff's claim against Dr. Khalid was merely an allegation that he failed to recommend a follow-up study, and not an allegation that Dr. Khalid failed to properly diagnose the decedent's lung cancer. Regardless of plaintiff's choice of words in drafting her complaint, the gravamen of plaintiff's claim against defendant Dr. Khalid is a medical malpractice wrongful death action based on the decedent's lost opportunity to survive because of defendants' alleged malpractice in failing to diagnose the decedent's cancer in December 1997.

Viewed in a light most favorable to plaintiff, the deposition testimony of Dr. Weber establishes that from the time of Dr. Khalid's alleged malpractice in December 1997 until the time of the decedent's diagnosis of terminal cancer in November 2000, the decedent suffered a 60 to 70 percent loss of opportunity to survive lung cancer, which satisfies MCL 600.2912a(2). Therefore, the trial court erred in granting defendants' motion for summary disposition.

Reversed.

/s/ Alton T. Davis  
/s/ Jessica R. Cooper  
/s/ Stephen L. Borrello